

June 06, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to recommend Callen DiGiovanni for a clerkship in your chambers. I have come to know Callen as a student in my Business Torts class this past semester, in which he has earned an A-.

Callen was a strong participant in the class, and demonstrated genuine interest in the material. He offered valuable comments during our class discussions, particularly on areas relating to privacy in the modern age and products liability in the age of the digital platform. He also offered insightful comments, which reflected deep thinking on his part, on the gaps between empirical theory and fact.

I also came to know Callen by discussing with him a paper he was writing for Hon. Jed Rakoff's seminar on Science and the Courts. In that paper, he argues that generative AI should be framed as a product, and that design defect and failure to warn torts can be particularly useful in addressing the problems of false and defective information. He also argues that the economic loss rule should not be removed in the context of generative AI. Based on my discussions with Callen on this project from its initial planning stages and through successive drafts, I believe he is a clear thinker, who is receptive to, and adept at integrating, constructive feedback.

On a personal level, Callen is a mature, dedicated, and thoughtful student who exhibits a genuine interest in the material. I believe he would be a valuable asset to your chambers. I hope you will seriously consider him as a candidate.

Sincerely,
Catherine M. Sharkey
Segal Family Professor of
Regulatory Law and Policy

Catherine Sharkey - catherine.sharkey@nyu.edu - 212-998-6729

June 07, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to recommend Callen DiGiovanni, a rising 3L at New York University School of Law, for a clerkship in your chambers. Callen is an intelligent and hard-working student with an engaging personality and a generous spirit. I am confident that he will excel as a judicial law clerk. I recommend him with enthusiasm.

I had the pleasure of teaching Callen in his first-semester Torts course in the fall of 2021. He was consistently prepared for cold calls, and he was an engaged—but never overbearing—volunteer in class discussions. He listened respectfully to his classmates' contributions and would often reference and build constructively on others' comments when he spoke. He frequently visited office hours with insightful questions. All around, I was impressed with his participation in the course.

On the blind-graded final exam, Callen earned one of only a dozen As in the ninety-five person course. The first question on the final exam asked students to write a bench memo to a New York Court of Appeals judge regarding a fictional case loosely based on *Tenuto v. Lederle Laboratories*, 687 N.E.2d 1300 (N.Y. 1997), which involved a lawsuit by a plaintiff who contracted the polio virus after a family member received the live-virus oral polio vaccine. I imposed a strict 1200-word cap on the bench memo, forcing students to be economical in their answers. Callen succinctly disposed of the plaintiff's weakest claims and focused the bulk of his attention on the most difficult issue (whether the plaintiff had a viable negligence claim against the pediatrician who administered the vaccine). Callen's analysis took careful stock of the relevant doctrinal and policy considerations, and he remained keenly attentive to the procedural posture. His ultimate recommendation (to send the negligence claim to the jury) tracked the New York Court of Appeals' actual resolution. The answer showed sound judgment, nuanced knowledge of the course material, and an impressive ability to write clearly and concisely under time pressure.

The second question on the final asked students to choose a case that we read in class that semester for which they agreed with the outcome but disagreed with the court's reasoning and then to write their own draft concurring opinion. Callen chose *Escola v. Coca-Cola Bottling Co. of Fresno*, 150 P.2d 436 (Cal. 1944), a landmark along the California Supreme Court's journey toward strict products liability for manufacturing defects. By choosing *Escola*, Callen made life somewhat more difficult for himself because there actually was a concurring opinion by Justice Roger Traynor in *Escola*—indeed, arguably the most famous concurring opinion in 20th century American tort law—and an A exam would have to go above and beyond Traynor's arguments. Callen carried that burden, anticipating and addressing counterarguments that Traynor overlooked and engaging more frankly than Traynor with the critique that strict products liability is simply the courts' way of jury-rigging a social safety net. (Callen conceded the point, noted that a system of social insurance for accidental injury may be preferable to strict products liability, and argued that the imposition of strict products liability may incentivize manufacturers to lobby in favor of social insurance as a replacement to tort compensation. For judges to stay their hand because a legislative solution would be optimal, Callen observed, would be to ignore the ways in which judicial decisions shape the political economy of legislation.)

On the basis of Callen's excellent performance in the Torts course, I asked Callen to be one of my teaching assistants for 1L Torts in the fall of 2022, and I was glad that he accepted the offer. I asked my eight TAs to organize themselves into pairs, and I assigned each pair to a quarter of the students in the course. One of the 1Ls who had Callen as her assigned TA wrote me afterwards to say that Callen and his co-TA had been "absolutely amazing and extremely helpful throughout the semester." Another student, who missed several classes on account of his Marine Corps Reserve duties, wrote to me to let me know that Callen had walked him through all the material that he missed. At the end of the semester, I had each TA pair present to the full course on a torts-related current events topic, and Callen and his co-TA gave an exceptionally clear presentation on the settlement between Remington Arms and families of the Sandy Hook school shooting victims. Overall, Callen exceeded the high expectations that I had for my TAs.

I have not had another opportunity to teach Callen over the last two years, but we have had many conversations in and out of office hours regarding his career aspirations. Callen aspires to be a litigator, and I expect that he will be a great one. He is eager to clerk and will take on the job with energy and commitment. You will no doubt enjoy having him in chambers—both because of his first-rate work product and his winning personality. I am thrilled to recommend him, and I urge you to hire him.

Please do not hesitate to contact me if you have any additional questions about Callen's application. You can reach me at daniel.hemel@nyu.edu or 914-629-7352.

Sincerely,

Daniel J. Hemel

Daniel Hemel - daniel.hemel@nyu.edu - 212.998.6354



New York University
A private university in the public service

Clayton P. Gillette
Max E. Greenberg Professor of Contract Law

April 19, 2023

Dear Judge:

I am writing on behalf of Callen DiGiovanni, a member of the NYU School of Law Class of 2024 who has informed me that he has applied for a clerkship with you following his graduation. Callen was a student in my Contracts class last spring. Based on his performance in that class, I asked Callen to serve as my research assistant this semester. It is on the basis of those relationships that I feel confident speaking about his qualifications and highly recommending him to you.

Callen's performance in the Contracts class placed him at the very top of his peers. As with any student to whom I would give such a high recommendation, Callen was consistently prepared, not only at a doctrinal level, but also at a level that revealed that he had thought about both the theoretical underpinnings of legal doctrine and the consequences of its application in the context of the cases we were studying. Beyond that level of preparation, however, Callen was a frequent and remarkably valuable contributor to class conversations. That's not to say that he would simply raise his hand to make a doctrinal or theoretical point. Instead, I recall that Callen would sit back with a bit of a Cheshire Cat grin on his face as the conversation about a particular point developed. At a strategic moment, he would raise his hand. I knew that if I called on him, his comments would likely advance the conversation and, as frequently as not, bring it to a productive end. Calling on him too early risked the likelihood that he would reveal a resolution that others were still struggling towards.

I am not suggesting that Callen agreed with me on all occasions. I was often the foil for one of Callen's insightful comments. While I try to introduce my students to various methodological approaches to Contracts, I make clear that I favor an approach that is identified with the Law and Economics perspective. Callen did not always agree with that methodological approach and had no compunction about disagreeing with my analysis from a different perspective, always with that telling smile on his face and always with the same civility and respect he consistently demonstrated in his interactions with other students in the class when he disagreed with them.

That same level of preparation and analysis was apparent on his exam at the end of the semester.

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I am severely restricted in the number of “A” grades that I can give under our rigorous first-year grading curve. Callen earned one of them. Given that performance, I was quite pleased when Callen approached me early this semester to ask whether I needed some research assistance. I was not intending to hire a research assistant, as I was working on a project that required some specialized knowledge. But given my appreciation of Callen’s talents, I decided that he might be helpful in developing some initial research for a project I intend to work on this summer. That was a stroke of very good fortune for me. The project involves the issue of when a party to a contract that contains no specific termination date is entitled to end the contract. Court decisions are all over the map on that issue, even though they often purport to follow the same standard. The issue I am exploring involves linking the characteristics of particular contracts to the judicial decisions. Callen took remarkable initiative in tracking down decisions that addressed the issue. Even more beneficially for me, however, he wrote a long and detailed memo in which he teased out many of the relevant facts on which courts either focused or implicitly considered. The memo was as good as I have ever received from a second-year law student and I am confident that much of Callen’s analysis will find its way into the final product.

As I have indicated above, Callen is as personable as he is intelligent. He is mature and outgoing, but also serious and confident. He even used his personal contacts to identify music venues that I should attend when I recently visited Austin, Texas. His recommendations were as good as his class performance. In this post-Zoom era in which students have become isolated and aloof, Callen’s level of personal and intellectual engagement with both people and substance is refreshing. I have no doubt that he will be an excellent colleague in chambers with both his fellow clerks and with the judge who is lucky enough to hire him. I strongly urge you to interview Callen and to consider his candidacy most seriously.

Please let me know if I can provide you with any additional information.

Sincerely,



Clayton P. Gillette

The following writing sample is a brief I prepared for the semi-final round of New York University School of Law's Orison S. Marden Moot Court Competition. All semi-finalists were assigned to write a brief and conduct oral arguments on behalf of either the Petitioner or Respondent without providing input on which side the student preferred to argue. Accordingly, the views expressed in this brief are not necessarily reflective of my own views on either this fact pattern specifically or the issue more generally. Additionally, I am the only person who edited this writing sample.

No. 24-3690

IN THE
Supreme Court of the
United States

UNITED STATES OF AMERICA,
Petitioner,

v.

PAUL YOUNG,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourteenth Circuit

BRIEF FOR RESPONDENT

RESPONDENT 7 (Issue II)
Counsel for Respondent

QUESTION PRESENTED

- (1) Whether the Fourteenth Circuit properly held that filings by represented incarcerated litigants receive the benefit of the prison mailbox rule.

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STATEMENT OF FACTS

Paul Young, Respondent, is an inmate at Fairview Correctional Facility (“Fairview Correctional”), a federal penitentiary in the District of Eagle State. (R. at 3.) Young has been incarcerated there for all relevant times. (R. at 13.) Additionally, this appeal concerns Young’s attempt to file a claim under the Federal Tort Claims Act (“FTCA”) against the United States, Petitioner. (R. at 3.) Young’s claim centers on the physical abuse Fairview Correctional prison guards perpetrated against him and the deficient medical treatment Fairview Correctional’s medical ward administered to him. (R. at 3.) The physical abuse occurred on February 14, 2017, wherein prison guards and several other inmates viciously beat Young in his own cell. (R. at 3, 13.) The prison guards then callously left him there with “a concussion, multiple cuts and bruises to the face, and nerve damage in the upper neck that has since resulted in chronic pain.” (R. at 13.) Despite his serious injuries, Young was thrown back into the general prison population after receiving little, if any, treatment from the prison’s medical ward. (R. at 13.)

After struggling to receive legal assistance, Young parted ways with his initial counsel and hired new counsel approximately a month before the two-year limitations period expired. (R. at 7, 13.) However, Young did not receive legal advice or assistance related to his administrative claim from either counsel. (R. at 3, 14.) Instead, because he was nervous about the deadline and the time it would take his new counsel to become abreast of his case, Young filed the administrative notice (“SF-95”) with the Bureau of Prisons (“BOP”) on his own. (R. at 13.) He did so on February 8, 2019, a full six days prior to the close of the limitations period, by appropriately handing it to a correctional officer to be sent out as First-Class Mail through Fairview Correctional’s mailing system. (R. at 4.) Thus, Young was only nominally represented in the filing of his SF-95 (i.e., he was represented in name only). (R. at 4, 13.) Unfortunately,

the United States Postal Service delivered the SF-95 on February 15, 2019, one day after the limitations period, due to a delay in the mailing process. (R. at 4.) As a result, the BOP rejected Young's claim as untimely. (R. at 4.) Young then proceeded to file suit with the District Court for the District of Eagle State after exhausting his administrative remedies. (R. at 4.)

The District Court granted summary judgment to Petitioner, reasoning that Houston and the "prison mailbox rule" do not apply to represented inmates, which that court considered Young. (R. at 8–10.) Young appealed. (R. at 11.) The Fourteenth Circuit reversed, reasoning that Houston and the prison mailbox rule should extend to represented inmates. (R. at 15–16.) Petitioner then filed a petition for a writ of certiorari, which this Court granted. (R. at 19.)

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit's grant of summary judgment to Young must be affirmed. Represented and unrepresented inmates are similar in that they are both straddled with administrative hurdles and vulnerable to misconduct by prison officials, whereas represented inmates are distinct from free litigants in that they cannot personally deliver a legal petition to a court clerk or access their counsel at a moment's notice. Additionally, since past courts have held that the prison mailbox rule extends to appeals filed by represented inmates, the rule should extend to all represented inmates, including those who are filing civil actions, to ensure that these litigants have their day in court. Moreover, this Court would not be upholding the statute of limitation's purpose by rejecting Young's claim. In turn, this Court should affirm the Fourteenth Circuit's reversal of the District Court and hold Young's filing as timely.

Even in the alternative where this Court does not extend the prison mailbox rule to filings by all represented inmates, this Court should still hold Young's filing as timely because nominal representation is distinct from how previous courts have established representation in the context

of the prison mailbox rule. Also, equating nominal representation with representation wherein an inmate receives legal advice and assistance is unfair and unjust. Therefore, in the scenario where this Court does not extend the prison mailbox rule to all represented inmates, this Court should still extend the prison mailbox rule to Young despite his nominal representation and affirm the Fourteenth Circuit's finding that Young's filing of his SF-95 was timely.

ARGUMENT

Petitioner appeals to challenge the Fourteenth Circuit's grant of summary judgment to Young. (R. at 11.) Appeals for summary judgment are reviewed de novo. Thompson v. District of Columbia, 832 F.3d 339, 344 (D.C. Cir. 2016). Summary judgments "shall" be granted if "there is no genuine dispute as to any material fact[.]" Fed. R. Civ. P. 56(a). A genuine dispute exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Upon de novo review, this Court should affirm the Fourteenth Circuit's reversal of the District Court.

I. THE PRISON MAILBOX RULE SHOULD EXTEND TO FILINGS BY REPRESENTED INMATES.

The "prison mailbox rule," dubbed by this Court as such in Johnson v. United States, 544 U.S. 295, 300 n.2 (2005), states that "a prisoner's pro se motion is deemed filed on the date the prisoner delivers it into the prison mailing system rather than on the date the court clerk receives it." United States v. Rodriguez-Aguirre, 30 F. App'x 803, 805 (10th Cir. 2002) (citing Houston v. Lack, 487 U.S. 266, 270 (1988)). This Court adopted the prison mailbox rule's general premise in Houston, reasoning that because pro se inmates face administrative hurdles not faced by other litigants, the filing requirements for these individuals should be more forgiving. See 487 U.S. at 275 ("[A] pro se prisoner has no choice but to hand his notice over to the prison authorities for forwarding to the court clerk." (emphasis omitted)). For an inmate to benefit from

the prison mailbox rule, he or she must follow certain requirements, such as “attest[ing] that . . . a timely filing was made[.]” Price v. Philpot, 420 F.3d 1158, 1165 (10th Cir. 2005) (citing United States v. Ceballos-Martinez, 387 F.3d 1140, 1143 (10th Cir. 2004)).

After Houston, the Federal Rules of Appellate Procedure codified the prison mailbox rule without specifying that the inmate must be unrepresented to benefit from the rule. United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004) (“[Federal] Rule [of Appellate Procedure] 4 was rewritten . . . to make the [prison] mailbox rule official”); Fed. R. App. P. 4(c)(1) (“If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution’s internal mail system on or before the last day for filing”).¹ As a result of Rule 4(c)’s current language, courts have held that the prison mailbox rule extends to both represented and unrepresented inmates within the appellate context, see, e.g., Craig, 368 F.3d at 740 (“Today the mailbox rule depends on Rule 4(c), not on how Kimberlin understood Houston.”), despite past holdings which required inmates to be unrepresented to benefit from the rule. United States v. Kimberlin, 898 F.2d 1262, 1265 (7th Cir. 1990), abrogated by id. Other courts have ignored Rule 4(c) when limiting the prison mailbox rule to unrepresented inmates. See, e.g., Burgs v. Johnson Cnty., Iowa, 79 F.3d 701, 702 (8th Cir. 1996) (rejecting Burgs’s appeal as untimely because he was represented despite Rule 4(c) technically governing).

As these differing views within the appellate context elucidate, the courts of appeals are currently divided on whether the prison mailbox rule should extend to filings by represented inmates, the issue here. (R. at 16, 19.) On one hand, various courts of appeals have cabined the prison mailbox rule based on an inmate’s representation status. For example, the Ninth Circuit

¹ The absence of “unrepresented” is particularly important because Rule 4(c) was codified as a direct response to Houston. See Fed. R. App. P. 4(c) advisory committee’s note to 1993 amendment (“The amendment reflects [the decision in Houston].”).

limited the prison mailbox rule to litigants who are “proceeding without assistance of counsel.” Stillman v. LaMarque, 319 F.3d 1199, 1201 (9th Cir. 2003). See also United States v. Camilo, 686 F. App’x 645, 646 (11th Cir. 2017) (“The [prison] mailbox rule was not intended to help prisoners with counsel, so it does not apply here.”); Cousin v. Lensing, 310 F.3d 843, 847 (5th Cir. 2002) (“[T]he justifications for leniency with respect to pro se prisoner litigants do not support the extension of the [prison] ‘mailbox rule’ to prisoners represented by counsel.” (emphasis omitted)). The Fourth Circuit, however, rejected these interpretations of Houston and extended the prison mailbox rule to notices of appeal filed by represented inmates, reasoning that the spirit of Houston extends to represented inmates. United States v. Moore, 24 F.3d 624, 625 (4th Cir. 1994). The Fourteenth Circuit agreed with the Fourth Circuit. (R. 15–16.) Thus, the circuit courts are divided on whether the prison mailbox rule applies to represented inmates.

Petitioner contends that Houston should be confined to unrepresented inmates. (R. at 3.) Young’s claim, if nominal representation equates to representation, would therefore be time barred because his SF-95 was only “properly delivered and stamped as received . . . one day after the limitations period.” (R. at 4.) However, while the prison mailbox rule should certainly continue to apply to unrepresented inmates as this Court held in Houston, this Court should not limit the rule to unrepresented inmates. Instead, this Court should extend the prison mailbox rule to filings by represented inmates and reject the restriction set forth by various courts of appeals. Accordingly, because Young submitted his SF-95 with Fairview Correctional’s mailing system within the FTCA’s two-year limitations period, and assuming arguendo that the prison mailbox rule applies to the FTCA, this Court should affirm the Fourteenth’s Circuit reversal of the District Court and hold Young’s filing as timely. (R. at 4.)

A. Represented Inmates Are Similar to Unrepresented Inmates But Distinct from Litigants Who Possess Their Liberty.

Even though Houston focused primarily on the struggles pro se inmates face when they file legal petitions, see Faile v. Upjohn Co., 988 F.2d 985, 987 (9th Cir. 1993) (“Houston relies on policy concerns surrounding the pro se prisoner’s lack of control over delays . . .”), represented and unrepresented inmates have much in common. In fact, “there is little justification for limiting Houston[] . . . to situations where the prisoner is not represented by counsel[.]” Moore, 24 F.3d at 625, particularly considering “[i]ncarcerated litigants, represented or not, are subject to a waterfall of administrative hurdles . . . that . . . cannot [be] number[ed].” (R. at 16.) For example, courts have recognized the potential for malfeasance by a prison mailing system related to timely forwarding a prisoner’s submissions to the court clerk and a pro se prisoner’s inability to prove such an allegation if one is leveled. See Hostler v. Groves, 912 F.2d 1158, 1161 (9th Cir. 1990) (recognizing that prison officials might intentionally delay the processing of 42 U.S.C. § 1983 actions because such actions are often used to target prison officials); Houston, 487 U.S. at 271 (“[A pro se prisoner’s] confinement prevents him from monitoring the process sufficiently to distinguish delay on the part of prison authorities from slow mail service or the court clerk’s failure to stamp the notice on the date received.”). A similar concern is present for represented inmates, seeing as “it is just as possible that [prison personnel] could choose to delay [the inmate’s] access to counsel.” Moore, 24 F.3d at 625.

Furthermore, Houston established a bright-line rule instead of a standard, which provides inmates with a notion of certainty and the system a sense of consistency. See Causey v. Cain, 450 F.3d 601, 604 (5th Cir. 2006) (recognizing that Houston “minimizes disputes and uncertainty over when filing occurs[.]”); Garvey v. Vaughn, 993 F.2d 776, 780 (11th Cir. 1993) (“Houston . . . create[d] . . . an equitable, standardized method for measuring time restrictions so

that requisite time limitations for filing do not preclude the incarcerated petitioner’s equal access to the courts.”). This benefit is applicable to represented and unrepresented inmates alike. Thus, due to the similarities between represented and unrepresented inmates as it relates to the prison mailbox rule, and since “prisoners may, in the interests of justice, require different filing rules[,]” Censke v. United States, 947 F.3d 488, 492 (7th Cir. 2020), this Court should affirm the Fourteenth Circuit’s reversal of the District Court and extend the rule to represented inmates.

Petitioner may argue that “[r]epresented prisoners are in no different position than litigants who are at liberty[.]” Kimberlin, 898 F.2d at 1265, and in turn assert that any similarities between represented and unrepresented inmates are overshadowed by the similarities between represented inmates and free litigants. Therefore, the argument goes, represented inmates should not receive the benefit of the prison mailbox rule because free litigants do not. See, e.g., Houston, 487 U.S. at 270 (holding that the prison mailbox rule applies to unrepresented inmates). Such an argument, however, is premised on a complete misunderstanding of the conditions to which prisoners are subject. For example, litigants who are at liberty can contact their counsel whenever they please. Inmates, despite contentions that “a prisoner who has the assistance of counsel need only pick up the phone[.]” Craig, 368 F.3d at 740 (citing Kimberlin, 898 F.2d at 1265), “may communicate and interact with others only on limited terms dictated by [their] jailers[.]” Allegra M. McLeod, Prison Abolition and Grounded Justice, 62 UCLA L. Rev. 1156, 1173–74 (2015). Furthermore, litigants who possess their liberty can linger at the courthouse as long as they like, “knowing that if the mail goes awry they can personally deliver notice at the last moment[.]” Houston, 487 U.S. at 271. Inmates, with or without representation, are physically incapable of doing so. Thus, since the hurdles described do not distinguish between represented and unrepresented inmates, neither should the prison mailbox rule.

Nor is there a different result when a represented inmate's attorney is considered.

Petitioner may contend that a represented inmate has an attorney who can file “whatever motions or notices the prisoner desires[.]” Rutledge v. United States, 230 F.3d 1041, 1052 (7th Cir. 2000). As a result, Petitioner may argue that “the prison is no longer responsible for any delays” if a represented inmate chooses to file his or her petition through the prison mail system rather than through his or her attorney. Cretacci v. Call, 988 F.3d 860, 867 (6th Cir. 2021), cert. denied, 142 S.Ct. 400 (2021). However, there is no guarantee that an attorney will monitor the inmate's documents properly. Petitioner may respond that, in such a scenario, “[r]emedies lie against [the inmate's] attorney, if anywhere[.]” Kimberlin, 898 F.2d at 1265, especially since “[c]ounsel should be aware of the potential for delay[.]” Rodriguez-Aguirre, 30 F. App'x at 805 (citing Houston, 487 U.S. at 270). But such a remedy is inadequate for two primary reasons.

First, it denies the individual his or her day in court for the initial action, flying in the face of the notion of fairness. Second, it restarts the process: To seek remedies from the negligent attorney, the inmate would likely need to hire another attorney and file new complaints, which, again, he or she cannot personally monitor. We should not force incarcerated inmates to remedy one attorney's failure by hiring another who is just as likely to fall victim to the same deficiencies, especially when the inmate's ability to pursue the prior, and likely more egregious, action dies in the process. Moreover, “the rule in Houston . . . seeks to ensure that imprisoned litigants are not disadvantaged by delays which other litigants might readily overcome.” Lewis v. Richmond City Police Dep't, 947 F.2d 733, 735 (4th Cir. 1991). Those delays include ones an inmate's attorney commits, given other litigants can “personally travel to the courthouse to see that the notice is stamped ‘filed’ or to establish the date on which the court received the notice.”

Houston, 487 U.S. at 271. Consequently, represented inmates are not in the same position as free litigants, and this Court should affirm the Fourteenth Circuit.

Finally, Petitioner may argue that a decision by this Court to extend the prison mailbox rule to represented inmates would grant them an unfair advantage over free litigants who are represented but do not benefit from this rule. With an understanding of the conditions to which prisoners are subject, it is quite a stretch to argue that inmates, represented or not, are advantaged when compared to free litigants. As the Fourth Circuit so aptly put it, represented inmates “would gladly trade those few extra days for the opportunity to timely deliver their notices in person.” Moore, 24 F.3d at 625. Accordingly, this Court should affirm the Fourteenth Circuit’s reversal of the District Court and extend the prison mailbox rule to represented inmates.

B. Since the Prison Mailbox Rule Has Been Extended to Represented Inmates Filing an Appeal, It Should Extend to All Represented Inmates.

This Court should also extend the prison mailbox rule to all represented inmates because other courts have extended the rule to represented inmates in the context of an appeal. For example, the Seventh Circuit acknowledged that Federal Rule of Appellate Procedure 4(c) failed to expressly limit its codification of Houston to unrepresented inmates, and thus that court extended the benefit of the rule to the represented inmate’s appeal. Craig, 368 F.3d at 740. In turn, Petitioner may concede that the prison mailbox rule applies to represented inmates in the context of an appeal but still maintain that the prison mailbox rule does not apply to represented litigants in contexts other than an appeal. However, if anything, the rule should apply in the reverse. In the context of an appeal, plaintiffs have normally already had their day in court. The same cannot be said for an incarcerated litigant who was barred from maintaining his complaint because of a technicality. Therefore, the fact that the Federal Rules of *Appellate* Procedure codified the prison mailbox rule without specifying that the inmate must be unrepresented, see

id. (“A court ought not pencil ‘unrepresented’ . . . into the text of Rule 4(c) . . .”), bolsters the argument that the prison mailbox rule should extend to all represented inmates, including those who are filing civil actions.

There are also fairness concerns that ultimately point this Court toward extending the prison mailbox rule to all represented inmates. First, it is not particularly burdensome to require “the clerk of a district court to wait a few extra days before receiving a notice” from an inmate, Moore, 24 F.3d at 626–27, particularly when such a burden is compared against an inmate’s ability to file and maintain a civil action against his abusive penitentiary. In response, Petitioner may assert that a statute of limitation’s purpose is to prevent parties from litigating stale claims. See John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133 (2008) (“Most statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims.” (citing United States v. Kubrick, 444 U.S. 111, 117 (1979))). In turn, Petitioner may contend that it would be unfair to require the United States to litigate a claim that was received by the court clerk after the limitations period. However, rejecting Young’s claim as untimely because of a delay in the mailing process does not help prevent stale claims from being sprung on defendants after an ample period of time has passed in which the litigant could have brought the petition. (R. at 4, 17.) Additionally, Petitioner may argue that extending the prison mailbox rule to represented inmates and thereby allowing Young to bypass the FTCA’s limitations period will burden the judiciary by forcing it to handle cases that would have otherwise been effectively rejected if the rule was not extended to filings by represented inmates. However, “[t]he benefits of efficiency can never be purchased at the cost of fairness.” Malcolm v. Nat’l Gypsum Co., 995 F.3d 346, 351 (2d Cir. 1993). Therefore, this Court should affirm the Fourteenth Circuit.

II. IF THIS COURT DOES NOT EXTEND THE PRISON MAILBOX RULE TO ALL REPRESENTED INMATES, THIS COURT SHOULD HOLD THAT NOMINAL REPRESENTATION DOES NOT COUNT AS REPRESENTATION FOR THE PURPOSE OF THE PRISON MAILBOX RULE.

Even in the alternative where this Court does not find that the prison mailbox rule extends to filings by all represented inmates, this Court should still extend the rule to Young because he was only nominally represented. This Court should adopt such a distinction because nominal representation is separate from the ways courts have previously established representation in the context of the prison mailbox rule and because a narrower definition of representation better aligns with the notions of fairness and justice. In turn, this Court should extend the prison mailbox rule to Young and hold his filing of the SF-95 as timely.

A. Nominal Representation Does Not Equate to Past Conceptions of Representation.

This Court should find that nominal representation does not equate to representation in the context of the prison mailbox rule. While circuit courts often reject filings by represented inmates after concluding that these inmates' petitions were not entitled to the prison mailbox rule due to their representation, see, e.g., Burgs, 79 F.3d at 702 (dismissing Burgs's appeal by concluding that it did not fall within Houston's purview because he was represented), the facts that lead courts, such as the Burgs court, to establish that inmates are represented are distinct from the facts of the present case. In Cretacci, where the Sixth Circuit considered Cretacci represented, "[Cretacci's attorney] attempted to file the complaint several times, and only when those attempts proved unsuccessful, advised [him] to file it with prison officials[.]" 988 F.3d at 866. Young's counsel neither attempted to file a SF-95 nor provided him with advice. Additionally and "[i]mportantly, [Cretacci's attorney] developed Cretacci's case against [the defendant], identified the proper legal causes of action to bring, and wrote the complaint." Id. The record does not indicate that anyone but Young developed his case, identified the causes of

action, or filled out the complaint. Therefore, while Cretacci’s counsel “agreed to represent [him] in his lawsuit[.]” id. at 867, similar to how Young “retained new private counsel for . . . any . . . litigation in connection with his imprisonment,” the two fact patterns should not be equated. (R. at 4.) Furthermore, in Rodriguez-Aguirre, the Tenth Circuit refused to extend the prison mailbox rule to Rodriguez-Aguirre, reasoning that he was represented, in part, because “his counsel followed overnight mailing instructions provided by the court clerk and mailed the motion[.]” 30 F. App’x at 805. Young’s counsel, however, neither contacted the court nor mailed any motion for him. Thus, given previous findings regarding representation are not in accord with Young’s nominal representation, Young should not be considered represented here.

Relevant to this analysis, Justice Stewart’s concurring opinion in Fallen v. United States, which this Court adopted, Houston, 487 U.S. at 270 (“We conclude that the analysis of the concurring opinion in Fallen applies here . . .”), set out a standard for determining whether the prisoner should be entitled to the benefit now referred to as the prison mailbox rule: whether the inmate was “acting without the aid of counsel[.]” 378 U.S. 139, 144 (1964) (Stewart, J., concurring). See also Stillman, 319 F.3d at 1201 (stating that the inmate must, *inter alia*, be “proceeding without assistance of counsel” to benefit from the prison mailbox rule). Despite potential contentions to the contrary, a prisoner can be nominally represented and still proceed without assistance of counsel. See Courtney Canedy, Note, The Prison Mailbox Rule and Passively Represented Prisoners, 16 Geo. Mason L. Rev. 773, 787 (2009) (“[A] ‘passively represented prisoner’ is a prisoner who, though technically represented by counsel, is acting . . . independent of that fact.”); United States v. Carter, 474 F. App’x 331, 333 (4th Cir. 2012) (deeming Carter as filing pro se because he handed the file to the prison’s mailing system himself despite having counsel). Thus, while Young had nominal representation, he was still

acting without assistance of counsel because he submitted his SF-95 independently. (R. at 4.) In turn, this Court should not consider him represented for the purpose of the prison mailbox rule.

Petitioner may argue that an inmate “has a right either to counsel or to proceed pro se, but has no right to ‘hybrid’ representation, in which [the inmate] is represented by counsel from time to time, but may slip into pro se mode for selected presentations.” United States v. Terry, No. 18-CR-560 (GRB), 2022 WL 2954085, at *3 (E.D.N.Y. July 26, 2022) (emphasis omitted) (quoting United States v. Rivernider, 828 F.3d 91, 108 (2d Cir. 2016)). Notably, the Terry court focused on the fact that the defendant, Terry, attempted to “withdraw his plea” at the same time his counsel was “fully engaged in the case.” Id. As a result, Terry is inapplicable here: There is an obvious demarcation between cherry-picking instances in which one uses his or her counsel and a scenario in which the inmate never engages his attorney other than in retaining her nominal representation. Given Young embodies the latter, he was not seeking “hybrid representation.” In turn, this Court should establish a distinction between nominal representation and representation in the context of the prison mailbox rule and hold Young’s filing as timely.

B. Definitions of “Practice of Law” Do Not Include Nominal Representation.

Young’s nominal representation also does not fall within definitions of the “practice of law.” Such definitions are relevant because courts have relied on these definitions when determining whether an inmate was “represented” in the context of the prison mailbox rule. See Cretacci, 988 F.3d at 866 (citing to the Tennessee Code and California’s definition of “practicing law” when deciding whether Cretacci was represented for the purpose of the prison mailbox rule). To begin, “practice of law” is defined to include “conducting cases in court, preparing papers . . . and advising clients on legal questions.” Practice of Law, Black’s Law Dictionary (11th ed. 2019). The record does not indicate that Young’s counsel engaged in these actions.

Additionally, the state of Tennessee defines the “practice of law” as appearing “as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings . . . before any court[.]” Tenn. Code Ann. § 23-3-101(3). The record includes nothing about Young’s counsel partaking in any of these activities. To be sure, the Ninth Circuit stated that “the practice of law in California . . . include[s] the preparing of legal documents and the giving of legal advice[.]” Stillman, 319 F.3d at 1201 (citing Birbrower, Montalbano, Condon & Frank v. Super. Ct., 949 P.2d 1, 5 (Cal. 1998)). Again, the record does not include anything about Young’s nominal representation preparing legal documents on his behalf or giving him legal advice. Therefore, because Young’s nominal representation also does not fit within definitions regarding the “practice of law,” this Court should not consider Young represented in this context.

C. A Narrow Construction of “Representation” is More Fair and Just.

This Court should not construe “representation” in the context of the prison mailbox rule to encompass nominal representation to better align with the notions of fairness and justice. Adopting a narrow interpretation of what constitutes “represented” aligns with the notions of fairness and justice because it ensures that inmates, like Young, who did not receive legal advice or assistance in fact are not disadvantaged by being placed in the same category as those who actually received legal advice and assistance. In other words, “[i]t would be neither logical nor just to treat [Young] as having an attorney if he has had none of the benefits representation is supposed to provide.” Vaughan v. Ricketts, 950 F.2d 1464, 1467 (9th Cir. 1991). But that is the exact outcome this Court would be adopting if it were to accept Petitioner’s likely contention that nominal representation should count as representation in the context of the prison mailbox rule. Moreover, this Court’s failure to adopt a more nuanced approach for constituting

representation may leave certain inmates out to dry because of an attorney's actions. For example, under a binary in which an inmate is either represented or acting pro se, an inmate whose counsel abandoned him after providing legal assistance but who also failed to end the attorney-client relationship would likely still be considered represented. Cf. Burgs, 79 F.3d at 702 (prioritizing whether the inmate was represented at the district court stage rather than in the specific filing in question). Such an outcome is alarming because an inmate would then be unable to rely on either his counsel or the prison mailbox rule. See Vaughan, 950 F.2d at 1467 (citing United States v. Dujanovic, 486 F.2d 182, 186 (9th Cir. 1973)) (stating that an inmate may not be capable of providing himself or herself with effective representation). This Court should therefore adopt a distinction between nominal representation and representation that allows, inter alia, "a prisoner whose counsel has not been technically discharged . . . [to] nonetheless invoke the rule in Houston if he can show that his counsel has abandoned him." Faile, 988 F.2d at 988. Thus, if this Court does not extend the prison mailbox rule to all represented inmates, this Court should adopt a narrow conception of what constitutes representation in the context of the prison mailbox rule and thereby consider Young's SF-95 as timely since he submitted it to Fairview Correctional's mailing system on time. (R. at 4.)

CONCLUSION

For the foregoing reasons, this Court should affirm the Fourteenth Circuit's reversal of the District Court and extend the prison mailbox rule to all represented inmates. As a result, this Court should find Young's filing of his SF-95 as timely. In the case where this Court does not extend the prison mailbox rule to all represented inmates, this Court should still hold Young's filing as timely because he was only nominally represented and submitted his SF-95 on time.

Applicant Details

First Name	Ethan
Last Name	Dilks
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Contact Phone Number	6097844794

Applicant Education

BA/BS From	The College of New Jersey
Date of BA/BS	May 2014
JD/LLB From	Indiana University Maurer School of Law
	http://www.law.indiana.edu
Date of JD/LLB	May 4, 2024
Class Rank	5%
Law Review/Journal	Yes
Journal(s)	Indiana Law Journal
Moot Court Experience	Yes
Moot Court Name(s)	Sherman Minton Moot Court

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	Yes
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Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Aman, Alfred
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Quintanilla, Victor
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Decker, Janet
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

ETHAN DILKS

400 S. Henderson St., Apt. 4 • Bloomington, Indiana 47401 • (609) 784-4794 • edilks@iu.edu

May 27, 2023

Attn: Chambers of the Honorable Juan R. Sanchez
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Chief Judge Sanchez:

My commitment to public service is what brought me to law school; it is my “why” for all that I do, and what has prepared me to serve the people of Pennsylvania as your clerk. I decided to go to law school after seeing first-hand challenges many communities face within our nation during my years as a social studies teacher in New Jersey. I am enrolled in a joint degree designed to facilitate public service; in May 2024, I will be graduating with a JD from the Indiana University Maurer School of Law and with an MPA from the IU O’Neill School of Public and Environmental Affairs. I want to work with and learn from you because of your commitments to the public interest and diversity in our courts.

I have learned the skills required to be an effective clerk. This spring, I interned with the chambers of Indiana Supreme Court Chief Justice Loretta Rush and learned the inside functioning of a judicial chambers. I have honed my legal research and writing skills in my legal and policy internships with the New Jersey Division of Law and the EEOC. I have also built on my experiences with my research assistantships at Maurer. Between them all, I have drafted opinions for an administrative law judge, written motions and reply briefs, parsed dockets, and researched emerging topics of law for publication in a hornbook. These varied experiences increased my knowledge of law and policy, have given me the skills and tools to be a lawyer and clerk, and honed my time-management and ability to meet competing deadlines. Throughout all my experiences, I built strong and cooperative relationships with peers, managers, and clients, and wish to do so in the James A. Byrne Courthouse.

My life-long commitment to public service has given me the skills to be a successful attorney and clerk. I spent twelve years of my life serving my community as a Boy Scout, ultimately earning the rank of Eagle. After college, I entered public service as a social studies teacher. Teaching in under-resourced communities strengthened my compassion and made me deeply interested in access to justice, civil rights, and equity in the justice system. Teaching middle schoolers taught me public speaking and problem solving in front of one of the toughest crowds imaginable. As a JD/MPA student, I remain active in public service by serving the people of Bloomington and Indiana at large. Specifically, I have served in multiple roles with the Incarcerated Individuals Legal Assistance Project, providing research assistance to incarcerated persons, and with Outreach for Legal Literacy, providing legal and civic education to fifth grade students. Between my experiences as a teacher and my legal work, I have learned the art of explaining legal and complex topics in a way that is digestible by nonexperts. This practical experience outside of the legal field will help me be a better lawyer, be a better clerk, and allow me to better serve in Philadelphia

Thank you for taking the time to consider my application, and I look forward to hearing back from you.

Sincerely,

Ethan Dilks (he/him/his)

ETHAN DILKS

400 S. Henderson Street, Apt. 4 • Bloomington, Indiana 47401 • (609) 784-4794 • edilks@iu.edu

EDUCATION

Indiana University Maurer School of Law	Bloomington, IN
<i>J.D. with Minor in Education Policy</i> , GPA: 3.847/4.000, Top 3%	May 2024
<ul style="list-style-type: none"> • Top grade in Legal Research and Writing II • Top grade in Seminar in Law & Economics • <u>Sherman Minton Moot Court Competition</u>, Participant ('21) Best Brief and Oral Advocacy Honors • <u>Indiana Law Journal</u>, Associate vol. 98 ('22-'23), Online Editor vol. 99 ('23-'24) • <u>Tolled Education</u>, presumed for publication in vol. 12 of <u>Indiana Journal of Law and Social Equality</u> • <u>Outreach for Legal Literacy</u>, Member ('20-'21, '23-present), Curriculum Director ('21-'22), Advisor ('22-'23) • <u>Incarcerated Individuals Legal Assistance Project</u>, Volunteer ('20-'21, '22-present), Research Director ('21-'22) 	
Indiana University O'Neill School of Public and Environmental Affairs	Bloomington, IN
<i>M.P.A. with Concentration in Policy Analysis</i> , GPA: 3.925/4.000	May 2024
The College of New Jersey	Ewing, NJ
<i>B.A. Social Studies Education</i> , GPA: 3.523/4.000	May 2014

LEGAL AND POLICY EXPERIENCE

Yale Law School, Jerome N. Frank Legal Service Organization	New Haven, CT
<i>Summer Fellow</i>	May 2023 – Aug. 2023
<ul style="list-style-type: none"> • Draft amended complaint and conduct research for district court litigation related to federal civil rights law • Draft materials and did research for FOIA requests and litigation 	
Indiana University Maurer School of Law	Bloomington, IN
<i>Research Assistant (Victor Quintanilla)</i>	Jan. 2022 – Present
<ul style="list-style-type: none"> • Research and writing memoranda for Professor Quintanilla's large access to justice in virtual court project as a Civil Justice Design & Equity Fellow • Aided and guided onboarding of peers and students in the associated Project Management Course 	
<i>Research Assistant (Alfred Aman)</i>	Apr. 2022 – Sept. 2022; Jan. 2023 – Present
<ul style="list-style-type: none"> • Proof-read, researched, and drafted section for the new edition of his hornbook on administrative law • Read and categorized articles by themes, areas of law, and significance for upcoming publications 	
Indiana Supreme Court	Indianapolis, IN
<i>Extern in the Chambers of Chief Justice Loretta Rush</i>	Jan. 2023 – Apr. 2023
<ul style="list-style-type: none"> • Conducted legal research and draft memoranda on court action as to petitions for transfer • Participated in discussions and debates in chambers 	
Equal Employment Opportunity Commission	Indianapolis, IN
<i>Summer Intern (Indianapolis District Office)</i>	May 2022 – August 2022
<ul style="list-style-type: none"> • Conducted legal research into and drafting memoranda on questions related to civil rights and employment law • Drafted court orders related to motions for summary judgment • Assisted in trial preparation by digesting depositions, drafting motions, and interviewing prospective witnesses 	
Faegre Drinker Biddle & Reath, LLP	Indianapolis, IN
<i>Legislative Session Intern (Government and Regulatory Affairs)</i>	Jan. 2022 – Mar. 2022
<ul style="list-style-type: none"> • Wrote reports for clients about bills during the legislative session which impact their interests • Wrote memoranda, doing research, and taking notes during meetings for relevant issues 	
New Jersey Division of Law	Trenton, NJ
<i>Summer Intern (Department of Children and Families-Central Section)</i>	June 2021 – Aug. 2021
<ul style="list-style-type: none"> • Co-wrote memoranda combining varied law (New Jersey statutes, case law, administrative rule, court rules, and ethics rules) and containing comparative analysis across states to address legal questions • Researched questions related to the New Jersey Rules of Evidence 	

COMMUNITY SERVICE, SKILLS, AND INTERESTS

Community Service: Eagle Scout (Boy Scouts of America, Oct. 2010); 550+ pro bono hours in law school to date
Skills: Westlaw, LexisNexis, Lexis CaseMap, MS Office and OneDrive (Word, Excel, Access, etc), G-Suite, R, Python
Interests: Trying new recipes; playing strategy board and video games; biographies of American figures

Academic Record of Dilks, Ethan W.

J.D. in progress

Graduated from The College Of New Jersey on 5/1/2014. Major: History.

M.P.A. in progress

Student ID: 2000772596

Indiana University
Maurer School of Law -- Bloomington

I Semester 2020-2021

Contracts	Mattioli, M.	B501	4.0	A-
Civil Procedure	Quintanilla, V.	B533	4.0	A-
Torts	Gjerdengen, D.	B531	4.0	A-
Legal Res & Writing	Goodman, S.	B542	2.0	A-
Legal Profession	Wallace, S.	B614	1.0	S
Dean's Honors	Sem 51.80/14=3.70	Cum 51.80/14.0=3.700	Hours passed 15.0	

II Semester 2020-2021

Legal Res & Writing II	Goodman, S.	B543	2.0	A*
Constitutional Law I	Conkle, D.	B513	4.0	A
Legal Profession II	Krishnan, J.	B614	3.0	A-
Criminal Law	Hoffmann, J.	B511	3.0	B+
Property	Cole, D.	B521	4.0	P
Dean's Honors	Sem 45.00/12=3.75	Cum 96.80/26.0=3.723	Hours passed 31.0	

I Semester 2021-2022

^Appellate Advocacy	Lahn, S.	B642	1.0	S
Law & Ed: Legal Persp		B658	3.0	A
	Sem 12.00/3=4.00	Cum 108.80/29.0=3.752	Hours passed 35.0	

II Semester 2021-2022

Administrative Law	Aman, A.	B713	3.0	A
Law & Ed: Adv School Law		B658	3.0	A
	Sem 24.00/6=4.00	Cum 132.80/35.0=3.794	Hours passed 41.0	

I Semester 2022-2023

Indiana Law Journal	Sanders, S.	B674	1.0	S
Civil Procedure II	Geyh, C.	B534	3.0	A
Trusts & Estates	Stake, J.	B645	3.0	A
Law & Ed: Higher Ed & Law		B658	3.0	A
S Law & Economics	Dau-Schmidt, K.	L713	3.0	A+
Dean's Honors	Sem 48.00/12=4.00	Cum 180.80/47.0=3.847	Hours passed 54.0	

II Semester 2022-2023

Indiana Law Journal	Sanders, S.	B674	1.0	S
^Judicial Field Placement	Violi, L.	B698	2.0	S
^Pretrial Lit:Depositions	Vaidik, N.	B564	1.0	S
	Sem 0.00/0=0.00	Cum 180.80/47.0=3.847	Hours passed 58.0	
			Hours Incomplete 0.0	

Grade and credit points are assigned as follows: A+ or A = 4.0; A- = 3.7; B+ = 3.3; B = 3.0; B- = 2.7; C+ = 2.3; C = 2.0; C- = 1.7; D = 1.0; F = 0. A "C-" grade in our grading scheme reflects a failing grade and no credit. An "F" is reserved for instances of academic misconduct. At graduation, honors designation is as follows: Summa Cum Laude - top 1%; Magna Cum Laude - top 10%; Cum Laude - top 30%. For Dean Honors each semester (top 30% of class for that semester) and overall Honors determination, grades are not rounded to the nearest hundredths as they are on this record. Marked (*) grades are Highest Grade in class. Since this law school converts passing grades ("C" or higher) in courses approved from another college or department into a "P" (pass grade), for which no credit points are assigned, there may be a slight discrepancy between the G.P.A. on this law school record and the G.P.A. on the University transcript. Official transcripts may be obtained for a fee from the Indiana University Registrar at the request of the student.

122643

May 28, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

This is a letter of recommendation on behalf of Ethan W. Dilks, a candidate for a judicial clerkship in your office. I have known Mr. Dilks since he was a student in my Administrative Law Class in the spring of 2022. He was an extraordinary student, always well prepared and he effectively participated at a high level throughout the course. In an anonymously graded exam for a large class, I was not at all surprised to learn that his was the best exam by far. I have had the pleasure to teach a great number of superb students, over a long teaching and research career at Cornell and Indiana Universities. I can say, without hesitation, that Mr. Dilks is one of the very best students I have ever had the pleasure of teaching. He is engaged and engaging, attentive and personable. Most important, he is perceptive and proactive in terms of what he is asked to do and the work product he turns in. He ranks in the top 3-5 % of his class. For these and the reasons set forth below, I recommend him without hesitation and with the greatest of enthusiasm.

I have worked closely with Mr. Dilks for some time. And continue to do so this year. When I realized how superb a student he was, I asked him to be my research assistant. I was then working on an update of the 4th edition of my Administrative Law Hornbook for West Academic Press. It had not been updated for several years; the law had changed substantially in many areas and continued to evolve. I asked Mr. Dilks to research and update some of the most important and difficult issues for the book, such as the changes emerging among the Justices' approaches to the nondelegation doctrine and the emergence of what the Court called the Major Questions Doctrine. His research was thorough, authoritative, and fully grasped the direction and significance of these and related doctrinal trends. He presented his research to me in carefully and lucidly crafted memoranda, detailing the key cases, doctrinal changes, emerging law review literature, and likely trends in the coming years. He writes beautifully. His work was invaluable and always timely. I emphasize these aspects of his work here, not just because it showed a remarkable grasp of some difficult doctrines in Administrative Law and his ability to write so clearly about them, but because I believe it is illustrative of the care, timeliness and writing skill he will bring to whatever topic he may be working on in his role as a judicial law clerk.

Mr. Dilks is an extremely easy person with whom to work. He is engaging and has excellent judgment. He understands well and quickly the overall thrust of the questions he is asked to explore. He brainstorms well, is curious and capable of raising questions about the issues with which he works. At the same time, he is also a self-starter and understands quickly and well what may be at stake in any opinion he is asked to work on or, in my case, any article or chapter I may have had underway.

Mr. Dilks is deeply and broadly prepared intellectually to succeed in the job for which he applies. He will graduate at the top of his class with a joint JD/MPA degree, providing him not only with a law degree but a master's degree in environmental law and policy. His intellectual interests and breadth, coupled with his enormous technical legal abilities will make him an exceptionally well-prepared, knowledgeable, and personally engaging law clerk with whom to work. I believe he will perform the meticulous and creative tasks of a judicial clerkship with great success. I recommend him in the very highest of terms.

Yours sincerely,

Alfred C. Aman Jr.,

Roscoe C. O'Byrne Professor of Law, Emeritus, and Dean Emeritus
Indiana University, Maurer School of Law
Bloomington, Indiana, 47405

Alfred Aman - aaman@indiana.edu - 812-855-1902

June 05, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to offer my strongest and unequivocal endorsement for Mr. Ethan Dilks as a candidate for a federal clerkship in your esteemed chambers. It is with great enthusiasm that I recommend Ethan, the most exceptional law student I have had the pleasure of working with throughout my career. His remarkable talent, unwavering dedication, and outstanding achievements make him the ideal candidate for this prestigious position.

Having had the privilege of closely collaborating with Ethan over the past two years through the Center for Law, Society & Culture and as his professor in Civil Procedure, I have witnessed firsthand his exceptional abilities and commitment to excellence. Ethan's dedication to helping his fellow students grasp the intricacies of civil procedure and cultivate their legal thinking skills has set him apart as an exceptional teaching assistant. His valuable insights into judicial decision-making and his ability to teach others how to analyze and approach legal issues have earned him the admiration and respect of his peers.

Not only has Ethan excelled academically, but he has also demonstrated a deep commitment to expanding his legal knowledge and pursuing excellence through diverse experiences. His summer work at Yale Law School's Jerome N. Frank Legal Service Organization's Veterans Legal Services Clinic is a testament to his passion for the law and his dedication to making a meaningful impact. Engaging in a mix of litigation and policy work, Ethan continues to push the boundaries of his legal understanding and contribute to addressing unmet legal needs within our civil justice system.

Ethan's exemplary legal research and writing abilities, coupled with his strong leadership skills, further distinguish him as an outstanding candidate for a federal law clerkship. His exceptional performance in my Civil Procedure class and his consistently high grades demonstrate his mastery of complex legal concepts. Ethan's ability to tackle intricate projects within time constraints showcases his remarkable talent and promise as a legal professional. Moreover, his unwavering commitment to public interest work and addressing the unmet legal needs of individuals within our civil justice system underscores his dedication to serving the public good.

I would like to highlight Ethan's exceptional achievements and accolades throughout his academic journey. He has consistently received Dean's Honors in multiple semesters, earning the top grade in Advanced Legal Research and Writing during his first year. His dedication and hard work were also recognized when he won the Best Brief award with his moot court partner in his second year. Additionally, Ethan had the opportunity to draft two summary judgment orders for an Administrative Law Judge at the EEOC in their federal hearings unit, further solidifying his practical legal skills.

Furthermore, Ethan's commitment to serving marginalized communities and addressing systemic issues has been exemplary. His extensive involvement with organizations such as ILAP and OLL, where he held leadership positions and actively contributed to their missions, speaks to his passion for making a positive impact. Notably, Ethan's founding of MaurerPlus, the joint degree student organization, exemplifies his drive to create a supportive network for students with multidisciplinary interests, facilitating their integration back into the law school community.

Beyond his academic pursuits, Ethan's commitment to leadership and public service is deeply ingrained in his character. From his involvement in the Boy Scouts, where he held numerous positions of responsibility, to achieving the rank of Eagle, he has demonstrated the values of servant leadership, leading by example, and active participation. His commitment to environmental stewardship was evident when he worked with the U.S. Forestry Service, dedicating a week to clear obstacles obstructing local wildlife in the Gros Ventre Wilderness. Moreover, his experience as a substitute teacher and subsequent full-time teaching role in schools across New Jersey underscore his genuine concern for the struggles faced by students and his drive to address systemic issues through his legal and MPA studies.

Ethan's leadership style is characterized by empowering and fostering collaboration among team members. His inclusive approach ensures that everyone's voice is heard, encouraging a supportive and harmonious working environment. This exceptional quality, combined with his exceptional legal acumen, work ethic, and leadership qualities, positions Ethan as an exemplary legal professional and an invaluable asset to any team or organization.

In conclusion, I wholeheartedly and without reservation recommend Ethan Dilks for a federal law clerkship. His outstanding achievements, dedication to public service, and commitment to excellence make him the epitome of an ideal candidate for this esteemed position. I am confident that Ethan will excel in the role, contributing significantly to the chambers and leaving a lasting impact on the legal profession.

Please feel free to reach out to me should you require any further information or have any questions regarding Ethan's qualifications or accomplishments.

Sincerely,

Victor Quintanilla - vdq@indiana.edu - 812-856-2285

Victor D. Quintanilla
Professor of Law & Val Nolan Faculty Fellow
IU Maurer School of Law
Indiana University Bicentennial Professor 2019-2020
Affiliated Professor, IU Department of Psychological and Brain Sciences
Affiliated Scholar, American Bar Foundation

Victor Quintanilla - vdq@indiana.edu - 812-856-2285

June 02, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

With great enthusiasm, I'm writing to support Mr. Ethan Dilks's clerkship application. I have been teaching law and education students at the university level for 18 years and would rank Mr. Dilks in the top percentile of my past and current students—his capabilities truly stand out. In all my interactions with him, I have been impressed with his passion for social justice, maturity, and keen intellect.

Mr. Dilks started his career as a successful and dedicated history and social studies teacher in New Jersey, but he was motivated to learn more about law and policy. To achieve this goal, he matriculated to Indiana University's Maurer School of Law. Unlike the great majority of his peers, Mr. Dilks is completing two degrees simultaneously – a J.D. and a Master of Public Affairs with a concentration in Policy Analysis. He is in the top of his class in both programs.

Also, unlike other law students, he is taking full advantage of as many opportunities as possible while successfully balancing a very demanding work, school, and extracurricular schedule. It is because Mr. Dilks chose to complete the J.D. Minor in Educational Policy that I met him three years ago. This minor, which I oversee, requires him to complete a variety of requirements including an additional two courses beyond the J.D. required coursework.

I was so impressed with Mr. Dilks that I asked him to become a Discussion Instructor at the School of Education to co-teach the undergraduate course EDUC-A308 (Legal and Ethical Issues for Teachers). He has participated in every large lecture that I led on Mondays and then he leads a smaller discussion section later in the week. Mr. Dilks has held this position for the past year and I work closely with him, so I'm in an ideal position to evaluate how successful he will be as a clerk for your chambers.

We have a team of five discussion instructors and Mr. Dilks stands out as the leader of the group. He interacts with the other instructors and his students with professionalism and care. He proactively handles issues and solves problems without being asked to do so. These attributes make him an ideal clerk.

Also related to his responsibilities as a clerk, Mr. Dilks is extremely skilled at translating complicated legal information to a non-legal audience (i.e., our students). He continuously prioritizes his teaching, improves our curriculum, and spends incredible amounts of time getting to know and assist his many students.

It is also noteworthy to mention that during Mr. Dilks's tenure working with me, he has also successfully balanced four additional part-time positions. One of these positions includes working with Chief Justice Loretta Rush of the Indiana Supreme Court which involves a two-hour commute. The fact that the Chief Justice chose Mr. Dilks from a large pool of interested law students is a testament to how impressive and exceptional he is. Plus, Mr. Dilks is extremely involved at law school as a leader of Outreach for Legal Literacy and the Incarcerated Individuals Legal Assistance Program. I'm familiar with these organizations and they require a serious investment of time and energy.

Despite his unusually demanding schedule, Mr. Dilks has prioritized time to devote to his research and writing. He spent the past year writing, thinking about, and revising a law journal article which has been selected for publication in Maurer's prestigious Indiana Journal of Law and Social Equality. I honestly do not know how he is able to be such an exceptional Discussion Instructor and student while working multiple jobs and participating in so many organizations. Some students who choose to take on numerous responsibilities end up cutting corners in the quality of their work. Mr. Dilks has not. He is dependable, highly organized, and conscientious. Clearly, he has excellent time management skills and an extraordinary work ethic.

In closing, I strongly encourage you offer Mr. Dilks a clerkship. When speaking with him about this opportunity, he stated he was interested because it will allow him the opportunity to grow as a legal scholar and practitioner. Additionally, he is confident that he can "do good work" in this clerkship. From his position with Chief Justice Rush, he already knows that he enjoys and is skilled at conducting legal research and writing. He plans on a litigation career in public interest law, specifically civil rights, education, and employment. He aspires to contribute to your court because he recognizes it is an opportunity to work toward providing just outcomes. Mr. Dilks has an established record of not only scholarly excellence, but also as a leader at Indiana University. Please extend him an invitation to interview; he will impress you with his friendly demeanor, his wealth of relevant experience in policy analysis and the law, and his proven dedication to the justice system. If I can provide any additional information on this distinguished applicant, please do not hesitate to contact me at (812) 856-8375 or deckerjr@indiana.edu.

Sincerely,

Janet R. Decker, J.D., Ph.D.
Assoc. Professor
Educational Leadership and Policy Studies
School of Education, Indiana University

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ETHAN DILKS

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WRITING SAMPLE

The following writing sample is an excerpt of an objective legal brief written during my second-semester legal research and writing course at Indiana Maurer School of Law. The brief is for a motion for summary judgment in a hypothetical case. Ms. Eilish's ex-fiancé, Mr. Johnson, was suing in Ohio's Second Appellate District to recover the engagement ring. Ms. Eilish has moved for summary judgment.

There is a district-split in Ohio for the legal requirements for the return of an engagement ring, so there are two analyses of different rules the district may apply. The writing sample includes those two argument sections and the overall conclusion.

This sample is my own, original work, although with minor suggestions from my legal writing professor.

Dilks

ARGUMENT

In a motion for summary judgment, the movant must show that “(1) there is no genuine issue of material fact; (2) the [movant] is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the [nonmovant], and that conclusion is adverse to the [nonmovant].” *U.S. Bank N.A. v. Stocks*, 98 N.E.3d 1217, 1234 (Ohio Ct. App. 2d 2017) (referencing Ohio R. Civ. P. 56(C)).

In this case, there are no disputed material facts between the parties and the rule application is a matter of law. *See, e.g., Coconis v. Christakis*, 435 N.E.2d 100, 101–02 (Ohio Belmont Cnty. Ct. 1981) (granting summary judgment in an engagement ring case). Under this District’s fault rule, the evidence, even when viewed most strongly in Mr. Johnson’s favor, shows Mr. Johnson has no claim to the ring; similarly, even if one considers the use of other tests, Mr. Johnson is still unable to win under a gender-neutral no-fault rule. Because Mr. Johnson is unable to recover the ring as a matter of law, summary judgment must be granted in Ms. Eilish’s favor.

I. Under the fault rule of this district, the ring became an irrevocable *inter vivos* gift after Mr. Johnson unjustifiably breached the engagement.

Within the Second District, the governing rule is that “absent an agreement to the contrary an engagement ring need not be returned when the engagement is unjustifiably broken by the donor.” *Wion v. Henderson*, 494 N.E.2d 133, 134 (Ohio Ct. App. 2d 1985). This establishes a “fault rule,” *Cooper v. Smith*, 800 N.E.2d 372, 377 (Ohio Ct. App. 4th 2003): an engagement ring, while being a conditional gift,

goes to the party without fault in the event of a nonmutual breach of the betrothal.

“This approach also recognizes that if the donor had kept the promise, the gifts would belong to the donee. . . . Thus, it attempts to prevent the donor from being rewarded for breaking a promise.” *Id.* at 377–78 (citing *Mate v. Abrahams*, 62 A.2d 754, 754–55 (N.J. Essex Cnty. Ct. 1948)).

The holdings of this district, dating back to the 1980s, have been consistent with that fault rule. The earliest of those cases, *Wion*, 494 N.E.2d at 133–34, relied on precedent within Ohio: *Wilson v. Dabo*, 461 N.E.2d 8, 9 (Ohio Ct. App. 10th 1983); and *Coconis v. Christakis*, 435 N.E.2d 100, 102 (Ohio Belmont Cnty. Ct. 1981). These all deal specifically with engagement rings and, while phrasing the fault rule in different ways, all achieve the same result: the gift of an engagement ring is not solely conditioned on the wedding occurring, but also conditioned on the conduct of the parties during the engagement period and during the dissolution of the engagement. *See Wion*, 494 N.E.2d at 134; *Wilson*, 461 N.E.2d at 9; *Coconis*, 435 N.E.2d at 102. This rule has persisted and has been applied since *Wion*. *Coddington v. Leesman*, No. 17380, 1999 WL 63990, at *1 (Ohio Ct. App. 2d Feb. 12, 1999).

Cases within the district that do not specifically cite *Wion* or its line of cases are still consistent with this rule. *See Kelly v. Kelly*, 837 N.E.2d 811, 813–14 (Ohio Ct. App. 2d 2008) (analogizing wedding rings during annulment to engagement rings). In dicta, the *Kelly* court states, “[E]ngagement rings are *normally* regarded as conditional gifts that must be returned to the donor if the contemplated marriage does not occur.” *Id.* at 814 (emphasis added). The *Kelly* court presumed that

engagements will normally end through mutual understanding, so fault rule analysis does not apply as there is no fault.

Mutual consent is both parties agreeing at the time of dissolution to that dissolution, rather than it being a unilateral decision. The *Wilson* court describes mutual consent to dissolve as “the condition is not fulfilled *because* . . . both, of the parties change their minds” 461 N.E.2d at 9 (emphasis added). Both parties must be the cause together; in contrast, one party breaching the engagement, thereby being the sole cause of the nonfulfillment, is not mutual even if the other party comes to terms with that decision later. *See id.*

The party who breaches the engagement is presumptively at fault; however, this can be overcome in unusual circumstances. In *Wilson*, the court analogizes a betrothal to a contract and states that the breaching party is liable for making compensation to the nonbreaching party. 461 N.E.2d at 9–10. In *Coddington*, the court is clear that the nonbreaching donor would have been able to revoke the ring if he had not “slept on his rights.” 1999 WL 63990, at *1. As observed in *Cooper*, the goal is to prevent unjust enrichment for the breaching party. 800 N.E.2d at 377–78. Unusual circumstances arose in *Kelly*, 837 N.E.2d at 812–14. In that case, the donee had lied about her prior marital history; that history was incompatible with the donor’s religious beliefs and resulted in an annulment. *Id.* On those facts, the court held that a wedding band in an annulled marriage was analogous to the engagement ring and implicitly supported that the donor’s dissolution of the relationship as justified. *See id.*

In this case, Mr. Johnson was at fault by unilaterally and unjustifiably breaching the relationship.

The fault rule applies to engagement rings, including Ms. Eilish's ring. The ring here is referred to by all parties as an engagement ring. (Eilish Dep. 2:9–27; Johnson Dep. 1:42–2:1.) As there was no amicable or mutual settlement, that ring must now go through the binding, precedentially set fault rule analysis.

Mr. Johnson unilaterally ended this relationship rather than mutually ending it with Ms. Eilish. As opposed to the mutual consent described by the *Wilson* court, this relationship ended *because* Mr. Johnson changed his mind, not both parties: he determined the passion was gone and, in anger, end things after he was confronted by Ms. Eilish about his other connections. (Johnson Dep. 1:1–5, 26; Eilish Dep. 4:39–43.) Ms. Eilish initially protested the break-up (Eilish Dep. 5:2–6) before hopefully wishing for Mr. Johnson to return to her so they could work things out after he had some time (Eilish Dep. 6:30–42). Her eventual and reasonable anger and frustration with Mr. Johnson is not a cause and is not a result of a mutual decision.

Mr. Johnson is at fault for the dissolution of the relationship. As the breacher, he is presumptively at fault, as were the breaching parties in *Coddington* and *Wilson*. This presumption keeps with the goal of penalizing breaches and preventing unjust enrichment. No exceptional situation, like those that led to annulment in *Kelly*, offsets that. He was the one who refused to compromise in finding work and the one who consistently pursued more physical and emotional

space. (Johnson Dep. 1:20–39.) He pursued connections to other people and became withdrawn (*Id.* at 1:7–20), and he was the one who moved out the same night he had a fight with Ms. Eilish. (Eilish Dep. 4:40–43.) Ms. Eilish’s only “faults” were to offer too much support as they were struggling, to have received a job offer, and to have checked her fiancé’s phone (*Id.*; Johnson Dep. 1:20–39.) There is no fraud-like situation, as seen in *Kelly*, or any comparable issue in Ms. Eilish’s behavior to override the presumption of Mr. Johnson’s fault.

Under the precedent of this district, Mr. Johnson is at fault for the relationship’s dissolution, which converts the ring into an absolute *inter vivos* gift. His decision to end the relationship unilaterally and unjustifiably ensured an abnormal outcome; that then requires the court to analyze fault in the dissolution. That test produces the rightful result: Mr. Johnson does not get to simply break promises and be enriched by that action.

II. While this district consistently uses the fault rule, others have moved to a no-fault rule; even using gender-neutral variants of the no-fault rule, Ms. Eilish has title to the ring.

The gender-neutral no-fault rule states that “gifts [exchanged during the engagement period are] irrevocable *inter vivos* gifts unless they are expressly conditioned on the subsequent marriage.” *Cooper v. Smith*, 800 N.E.2d 372, 376 (Ohio Ct. App. 4th 2003) (citing *Linton v. Hasty*, 519 N.E.2d 161, 161 (Ind. App. Ct. 1988)) (considering and describing variant rules used in different jurisdictions). This iteration of the no-fault rule, while not being the binding rule for our district, provides numerous benefits.

This rule simplifies the doctrine and law of Ohio by eliminating implied conditions on gifts; the rule instead requires that gifts must be expressly conditioned on the subsequent marriage to be conditional. *See Albinger v. Harris*, 48 P.3d 711, 718–20 (Mont. 2000). Engagement rings are a historical holdover from the period where a betrothal was a legally enforceable contract. *See id.* at 718. When betrothals became unenforceable because of “Heart Balm Acts” in many states, including Ohio, the legal concept of rings being an implied conditional gift evolved. *See id.*; *see also* Ohio Rev. Code Ann. § 2305.29 (West, Westlaw through Files 1 to 3 of 134th Gen. Assemb. (2021-2022)). That legal fiction of implied condition creates a unique exception for engagement rings.

Implied conditions have rarely been and are not readily accepted in Ohio except for engagement rings. *See Wilkin v. Wilkin*, 688 N.E.2d 27, 29–30 (Ohio Ct. App. 4th 1996) (noting few cases of conditional gifts outside engagement rings in Ohio law); *Cooper*, 800 N.E.2d at 378–79 (discussing that engagement rings are a special category). Even for *causa mortis* gifts, which are legally like *inter vivos* conditional gifts, *see Albinger*, 48 P.3d at 719, the court requires “clear and convincing evidence” that the gift was conditional on death. *See In re Estate of McGeath*, 759 N.E.2d 408, 410 (Ohio Ct. App. 2d 2001) (citing *In re Estate of Newland*, 70 N.E.2d 234, 237 (Ohio Prob. Ct. Franklin Cnty. 1946)). This gender-neutral no-fault rule eliminates the engagement ring exception, requiring instead express intent to create a conditional gift in all cases. *Albinger*, 48 P.3d at 718. This no-fault rule is consistent with the evolving precedents of this district: the court in

Kelly v. Kelly supposes a normal situation wherein mutual and express decisions are made, which is consistent with this rule. 837 N.E.2d 811, 813–14 (Ohio Ct. App. 2d 2008).

The court's analysis becomes simpler once the engagement ring exception is removed. If the donor gives no express condition, it is an absolute *inter vivos* gift. In Ohio, a gift is property (1) given by the donor with intent to give, (2) delivered into the possession of the donee, and (3) accepted by that donee. *See, e.g., In re Guardianship of Marsh*, 900 N.E.2d 220, 223 (Ohio Ct. App. 2d 2008). Even allowing for express conditional gifts, this analysis is simple for the court to implement. *See Wilkin*, 688 N.E.2d at 29–30.

Bringing engagement rings in line with other gifts reduces implicit, gendered bias favoring men during the betrothal period. Due to social norms, men are the primary purchasers of engagement rings, and women and their families provide for most of the wedding itself. *Lindh v. Surman*, 742 A.2d 643, 647–48 (Pa. 1999) (Cappy, J., dissenting). Typically, most work in planning the wedding is done by women. *Albinger*, 48 P.3d at 720. No rule exists to compensate for expenses made in contemplation for marriage except for the engagement ring; this exception benefits donors, who are overwhelmingly men, and perpetuates bias against women. *Id.*

If this Court transitions to a no-fault rule, this gender-neutral rule provides the fairest outcome. As applied to this case, Mr. Johnson would have no claim as a matter of law.

Mr. Johnson should not benefit from an exception built into Ohio case law around engagement rings that would be reinforced by a conditional no-fault rule. The gender-neutral, *inter vivos* no-fault rule eliminates the engagement ring exception and simplifies the law and legal analysis: as illustrated by the *Wilkin* and *Cooper* courts, factors surrounding the timing of the engagement need to be analyzed for if an implied condition existed. Eliminating the engagement ring exception to conditional *inter vivos* gifts would simplify the law by removing circumstances from consideration. The only analysis which would need to occur would be that for an *inter vivos* gift.

If applying the gender-neutral, no-fault rule, Ms. Eilish's ring is simply an *inter vivos* gift. The Court administers such tests with clear and fair results often. As the court analyses in *In re Guardianship of Marsh* and *Wilkin* dictate, four elements must be shown as to conditional gifts. Here, Mr. Johnson intended the ring to be Ms. Eilish's after choosing it with her and stating she was worth the cost of it. (*Id.* at 1:28–31, 1:41–2:21.) He handed it to her; she accepted. (*Id.* 1:37–40.) He never expressly conditioned it on the marriage. (*Id.* at 2:9–27; Johnson Dep. 1:42–2:1.) The application of this rule is as straightforward here as with any other gift.

Mr. Johnson should not benefit from bias existing in a non-fault conditional gift rule. As noted by the court in *Albinger* and by Justice Cappy in dissent in *Lindh*, women usually financially lose in failed engagements. Ms. Eilish spent well over one-hundred hours planning the wedding and hundreds of dollars preparing for it. (Eilish Dep. 5:20–6:37.) She also spent close to \$1,000 on gifts for Mr.

Johnson during the engagement. (*Id.*) We are not presently arguing that she may get compensated for these by court order and do acknowledge that heart balm provisions likely preclude such an action. § 2305.29. However, the question of why Mr. Johnson and other men may then be compensated for their only substantial contribution to betrothal while Ms. Eilish and similarly situated women may not for any of theirs must be addressed. This rule would do so.

The Court is bound by the fault rule; however, should this change, the Court should this no-fault for its clarity, its simplicity, and its gender-neutrality. Under this rule, the Court would have to grant summary judgment for Ms. Eilish.

CONCLUSION

For the foregoing reasons, Defendant, Lily Eilish, respectfully requests that the Court grant her Motion for Summary Judgment.

April 16, 2021

Respectfully Submitted,

s/ Ethan Dilks

Ethan Dilks
Peel and Torres, LLP
1001 Wright Brothers Drive
Dayton, Ohio 45401
(937) 555-1121

Attorney for the Defendant.

Applicant Details

First Name	Anna
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Contact Phone Number	3526727904

Applicant Education

BA/BS From	University of Florida
Date of BA/BS	May 2021
JD/LLB From	The University of Chicago Law School
	https://www.law.uchicago.edu/
Date of JD/LLB	June 1, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	University of Chicago Business Law Review
Moot Court Experience	No

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	No
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

Posner, Eric
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Casey, Anthony
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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6/1/2023

The Honorable Juan R. Sanchez
James A. Byrne United States Courthouse
601 Market Street
Philadelphia, PA 19106-1729

Dear Chief Judge Sanchez:

I am a rising third-year student at the University of Chicago Law School, and I am writing to apply for a 2024 – 2025 clerkship. As an aspiring litigator with excellent research and writing skills as well as extensive courtroom experience gained during law school, I believe I would make a strong addition to your chambers. I would also love the opportunity to return to Philadelphia where my mother was born and raised, and a place where I still have family.

My interest in being an attorney began when I was a sophomore at the University of Florida. I took a mock trial course called Law & Literature that changed my life. The class would read a piece of literature, evaluate the legal issues, write a brief on behalf of the (fictional) defense or prosecution, and battle it out in a mock trial at the local courthouse. I was introduced to legal writing and the justice system, and I loved it. The first time I found myself intensely invested in a legal fight was while “defending” Dr. Jekyll for the murder of Sir Carew. Since then, my passion for litigation has only increased—especially now that I have been able to help real people.

My goal is to be an excellent litigator, and I plan to work on the trial level. Therefore, the most beneficial clerkship for me is with a district court judge. In a district court I can become an expert at the rules of procedure and evidence while receiving broad exposure to courtroom activities that will be a part of my career afterwards. Through multiple internships in law school, I have acquired extensive experience with such activities on the state and federal level from the perspective of attorneys. I hope to go behind the bench as a judicial clerk so I can experience it from the perspective of a neutral third party. I believe engaging directly with the decision-maker is a uniquely advantageous way to learn and grow as a person and lawyer. I am particularly interested in growing under your guidance due to your demonstrated commitment to public service and your extensive experience as a lawyer and jurist. Under your mentorship I know I would learn many valuable skills and lessons if given the chance.

I would welcome the opportunity to meet with you. Thank you for your consideration.

Sincerely,



Anna Dincher

ANNA DINCHER

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EDUCATION

The University of Chicago Law School, Chicago, IL June 2024
Juris Doctor

- 2022-23 Donald E. Egan Scholar
- *The University of Chicago Business Law Review*
 - 2023 – 2024, Managing Editor
 - 2022 – 2023, Member
 - Forthcoming Publication: Comment, “How to Fix DOJ Privilege Teams”
- Activities: Law & Economics Society, Criminal Law Society, Women’s Mentoring Program, Wine Mess

The University of Florida, Gainesville, FL May 2021

Bachelor of Arts, *summa cum laude*, in Economics with a minor in Sociology

- Activities: College of Liberal Arts & Sciences Student Council, UF Student Honor Code Administration, Inter-Residence Hall Association Area Government, ACCENT Speaker’s Bureau
- Study Abroad: UF in Europe (Ireland, France, and Italy) Fall 2019 Program
- Thesis: “The Effects of the 2016 Brexit Vote on the United Kingdom’s International Trade Flows”

EXPERIENCE

Jenner & Block, LLC, Chicago, IL May 2023 to July 2023
Summer Associate

Federal Defender Program for the Northern District of Illinois, Chicago, IL Jan 2023 to May 2023
Law Clerk

- Research legal issues and draft memoranda on relevant issues, including Fourth Amendment cell phone search violations and the Hobbs Act robbery elements
- Engage in client facing activities, including pretrial meetings, updates in jail, and rapport building

Cook County Public Defender’s Office, Chicago, IL August 2022
Law Clerk, Juvenile Justice Division

- Participated in court proceedings, including spontaneous drafting of court orders, subpoenas, motions for discovery, and automatic expungement orders
- Analyzed lengthy discovery documents and videos

Travis County District Attorney’s Office, Austin, TX May 2022 to July 2022
Legal Intern, Felony Trial Division

- Observed courtroom proceedings and created presentations for grand jury, voir dire, and trial
- Conducted field interviews of witnesses, medical examiners, and police detectives

Illinois Legal Aid Online, Chicago, IL Jan 2021 to May 2021
LiveHelp Volunteer Agent

- Provided navigational assistance to visitors to help them find forms and articles related to their legal issues
- Interpreted complex legal material and translated it into plain language



Name: Anna Dincher
Student ID: 12329085

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Current Status: Active in Program
J.D. in Law

External Education

University of Florida
Gainesville, Florida
Bachelor of Arts 2021

Beginning of Law School Record

Autumn 2021					
Course	Description	Attempted	Earned	Grade	
LAWS 30101	Elements of the Law Richard McAdams	3	3	177	
LAWS 30211	Civil Procedure William Hubbard	4	4	178	
LAWS 30611	Torts Adam Chilton	4	4	173	
LAWS 30711	Legal Research and Writing Hannah Shaffer	1	1	180	

Winter 2022					
Course	Description	Attempted	Earned	Grade	
LAWS 30311	Criminal Law Sonja Starr	4	4	178	
LAWS 30411	Property Lee Fennell	4	4	177	
LAWS 30511	Contracts Eric Posner	4	4	177	
LAWS 30711	Legal Research and Writing Hannah Shaffer	1	1	180	

Spring 2022					
Course	Description	Attempted	Earned	Grade	
LAWS 30712	Legal Research, Writing, and Advocacy Hannah Shaffer	2	2	180	
LAWS 30713	Transactional Lawyering David A Weisbach	3	3	178	
LAWS 43227	Race and Criminal Justice Policy Sonja Starr	3	3	177	
LAWS 44201	Legislation and Statutory Interpretation Farah Peterson	3	3	177	
LAWS 47201	Criminal Procedure I: The Investigative Process John Rappaport	3	3	177	

Honors/Awards
The University of Chicago Business Law Review, Staff Member 2022-23

Autumn 2022					
Course	Description	Attempted	Earned	Grade	
LAWS 46101	Administrative Law Thomas Ginsburg	3	3	180	
LAWS 53439	Mass Incarceration Roscoe Jones	3	3	183	
LAWS 53497	Editing and Advocacy Patrick Barry	2	2	P	
LAWS 94140	University of Chicago Business Law Review Anthony Casey	3	3	P	

Winter 2023					
Course	Description	Attempted	Earned	Grade	
LAWS 40101	Constitutional Law I: Governmental Structure David A Strauss	3	3	176	
LAWS 40201	Constitutional Law II: Freedom of Speech Genevieve Lakier	3	3	178	
LAWS 53463	Privacy and Modern Policing Meets Writing Project Requirement	3	3	179	
LAWS 91201	Prosecution and Defense Clinic Lisa Noller Molly Armour	4	4	177	
LAWS 94140	University of Chicago Business Law Review Anthony Casey	0	0	P	

Spring 2023					
Course	Description	Attempted	Earned	Grade	
LAWS 41601	Evidence John Rappaport	3	3	179	
LAWS 42801	Antitrust Law Eric Posner	3	3	180	
LAWS 53101	Legal Profession: Ethics Hal Morris	3	3	180	
LAWS 91201	Prosecution and Defense Clinic Lisa Noller Molly Armour	3	3	177	
LAWS 94140	University of Chicago Business Law Review Meets Substantial Research Paper Requirement	0	0	P	
Designation:	Anthony Casey				

End of University of Chicago Law School



Professor Eric Posner
Kirkland & Ellis Distinguished Service Professor of Law
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June 07, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to recommend Anna Dincher for a judicial clerkship. I have enjoyed having Anna as a student during her time at the University of Chicago Law School, where she has distinguished herself as a strong student and invaluable member of our community.

I have gotten to know Anna well as she has taken two courses from me and did a little work for me as a research assistant. She took the first-year contracts class, which I taught, and is currently taking antitrust. While her grades from the first quarter of her first year were somewhat uneven, she quickly recovered, and since then her grades have steadily improved and are now quite solid. (As she ruefully admitted to me, her college classes were just not very challenging and did not quite prepare her for the demands of a law school education.) Her grades for the last three classes for which I have a record are equivalent to A-, A, and B+. In my antitrust class, she has been an enthusiastic, well-prepared, and intelligent participant. My practice is to cold call students and stick with them for as long as they can answer my questions. When I last called on Anna, she gave me consistently accurate and concise answers to questions about a difficult supreme court cases involving the antitrust analysis of joint ventures and was able to keep up for forty minutes of interrogation. This was an unusually good performance by any measure and put on a good show for thirty recently admitted students who were visiting my class that day.

Anna has made time to take advantage of the intellectual community of the law school. She is the managing editor of the Business Law Review and has written a nice paper entitled How to Fix DOJ Privilege Teams. The paper surveys controversies over the practice of using privilege teams to review seized materials to address privilege risk and offers some sensible reform proposals. Her writing is clear and the argument solid though she would have done well to choose a more challenging topic. She has also participated in a range of student groups and activities. With her undergraduate background in economics, Anna has taken to law and economics, and antitrust law in particular, though she also discovered a passion for criminal law, which she finds both personally meaningful and intellectually stimulating.

Anna is a serious and highly intelligent person, but she also likes to laugh and smile and make jokes. She has a big personality in all the positive senses of that term. She is a pleasure to have around because she is fun to talk to and charismatic, and I imagine that she will get along well with your staff and other clerks in your chambers. But no one should underestimate her: she will be an excellent clerk and lawyer because she is smart, tough, and ambitious. I highly recommend her to you.

Sincerely,

Eric Posner

Eric Posner - eric_posner@law.uchicago.edu - 773-702-9494

Professor Anthony J. Casey

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June 01, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to recommend Anna Dincher for a clerkship in your chambers. I have come to know Anna through her exceptional work on the University of Chicago Business Law Review, where I serve as the faculty advisor. I am confident that Anna's outstanding research and writing skills, coupled with her strong judgment and dedication, make her an ideal candidate for a clerkship.

In the fall and winter, I had the privilege of supervising Anna's comment for the University of Chicago Business Law Review. It is one of the best and most thorough comments I have supervised. Her comment, which examines DOJ Privilege teams, displays a remarkable level of insight, meticulous research, and analytical skill. I urge you to read it in considering her application. Anna's comment demonstrates an exceptional ability to tackle complex legal issues and present her findings in a clear and compelling manner.

Additionally, Anna currently serves as the Managing Editor of the University of Chicago Business Law Review. In my interactions with her in that role, I have been consistently impressed by her exceptional judgment, intellectual rigor, and strong leadership skills. Anna has played a pivotal role in planning the journal's symposium for next year, demonstrating her organizational abilities and ability to collaborate effectively with others and her eye for important and timely legal topics. Her sharp intellect, combined with her professionalism and dedication, make her an asset to the journal and will translate to any team she is part of in the future.

In addition to her exemplary contributions to the journal, Anna's academic achievements and varied experiences further underscore her qualifications. During law school Anna has gained valuable practical experience through internships and clerkships at diverse institutions. This summer she will be a summer associate at Jenner & Block. During her 2L year, she served as a legal intern at the Federal Defender Program for the Northern District of Illinois. Last summer, she worked as a law clerk in the Cook County Public Defender's Office and the Travis County District Attorney's Office. These varied positions have given Anna a good sense of how the legal system operates in different contexts and with varied resources.

Anna's exceptional academic record, outstanding research and writing abilities, and her leadership role as the Managing Editor of the University of Chicago Business Law Review make her an exceptional candidate for a clerkship. Her dedication, strong judgment, and intellectual acumen will undoubtedly contribute to the work of your chambers. I recommend Anna for a clerkship in your chambers with the highest praise and confidence that she will exceed your expectations.

Should you require any further information or have any questions, please do not hesitate to contact me.

Very truly yours,
Anthony J. Casey

Anthony Casey - ajcasey@uchicago.edu - 773-702-9578

This work product is from my law school writing course, and it is entirely my own. No editing was completed by others.

MEMORANDUM

To: Alison Morse-Shaffer

From: Anna Dincher

Date: February 15, 2022

Re: SpaceY's potential defense of noncommercial speech under First Amendment doctrine

QUESTION PRESENTED

Our client Roy Kent served as an assistant coach for the Chicago Bears this past season. One day after the season ended, SpaceY put up billboards along I-55 in Chicago. The billboards featured an image of Kent's career-ending blind side sack from the prior year. Text on the billboards read "Check Your Blind Spot! You Should Care When Driving!" along with the SpaceY logo. The company CEO Eton Lusk explained the decision in a series of tweets, saying "we feel the safety message has profound importance for society." This memo considers whether SpaceY's billboards would be considered commercial or noncommercial speech under current First Amendment doctrine.

BRIEF ANSWER

It is highly likely a court would conclude that SpaceY's billboards qualify as commercial speech under First Amendment doctrine. The noncommercial and commercial elements of the billboards are easily separated. The billboards are a form of advertisement, and despite no mention of a specific SpaceY product, the company has an economic interest in the billboards as a way to promote awareness of SpaceY and its brand. Moreover, a court will likely conclude that classifying SpaceY's billboards as commercial is necessary to protect Kent's right to prevent misappropriation of his identity for commercial gain.

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FACTS

Last year, Roy Kent's football career ended with an injury from a sack in the last game of the Chicago Bears season. This year, Kent took up the role of assistant coach for the Bears. During the year, he was subjected to frequent insults from fans of opposing teams. He denied caring about the treatment in public, but he felt pain and anger in private when fans referenced his career-ending play. The Bears went on to win Super Bowl LVI this season.

One day after the championship, SpaceY put up billboards along I-55 in Chicago. The billboards displayed an image of Kent's career-ending blind side sack from the prior year. They also featured the SpaceY logo beside text on the billboards that read "Check Your Blind Spot! You Should Care When Driving!" The company CEO Eton Lusk explained the decision to put up the billboards in a series of tweets. Lusk acknowledged in one of the tweets that he had personal stake in an electric car company, which he acquired with inherited wealth. In subsequent tweets, he connected that ownership to SpaceY's billboards by arguing it had "taught [him] a lot about the importance of auto safety." Then, he recognized that SpaceY had no direct role in the automobile industry but said, "we feel the safety message has profound importance for society."

Kent was upset to learn about the billboards since he dislikes SpaceY. In response, Kent is considering potential claims he may have against SpaceY in relation to the billboards. Any claims will be litigated in the U.S. District Court for the Northern District of Illinois.

ANALYSIS

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The First Amendment guarantees freedom of expression by prohibiting the government from unreasonably restricting the right of individuals *and* corporations to speak freely. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, (2010). However, “not all speech is of equal First Amendment importance,” so certain categories of speech receive less constitutional protection than others. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988). Commercial speech, though still protected from unjustifiable government regulation, is protected to a lesser degree than noncommercial speech. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980). Speech is identified as commercial in nature when it is “expression related solely to the economic interests of the speaker and its audience.” *Id.* at 561. Alternatively, courts think of “the core notion of commercial speech” as speech that “does no more than propose a commercial transaction.” *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66 (1983). However, commercial speech is not limited to speech that only proposes a commercial transaction, and it would be misguided to believe otherwise. *See Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 516–17 (7th Cir. 2014).

When speech involves both commercial and noncommercial elements, courts may apply two tests to determine the appropriate classification. First, a court may assess whether the elements are “inextricably intertwined.” *See Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 782 (1988). If not, then it may apply the framework set out in *Bolger*, 463 U.S. 60, at 66, that analyzes whether the form of speech is an advertisement, whether specific products are mentioned, and whether an economic interest exists. It is worth noting that the *Bolger* framework is indefinite and leaves a good deal of room for other aspects to be considered. *See id.* at 66–67. Therefore, a court could broaden its analysis beyond the *Bolger* factors.

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1. The commercial and noncommercial speech elements of SpaceY’s billboards are not inextricably intertwined.

When a message has elements of both commercial and noncommercial speech, a court will classify the entire message as fully protected noncommercial speech if those elements are inextricably intertwined. *See Riley*, 487 U.S. at 796. Elements are inextricably intertwined when it’s impossible to separate them, such that delivering the commercial message is unattainable without also delivering the noncommercial message. *See id.*

In *Riley*, 487 U.S. at 796, the Court held that professional fundraisers’ solicitation of funds is inextricably intertwined with messaging about a charitable cause, because without the solicitation the delivery of such information would cease. It was impossible to have one without the other. Conversely, in *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469 (1989) a housewares company argued its First Amendment free speech right protected it from regulation because it was providing noncommercial economic messaging while demonstrating and selling houseware products at Tupperware parties. The Court held that it did not constitute inextricably intertwined messaging as nothing in its nature or in practice prevented its separation. *See Fox*, 492 U.S. 469, at 474.

SpaceY’s billboards included the SpaceY logo, an image of Roy Kent being sacked, and the words “Check Your Blind Spot! You Should Care When Driving!” The only commercial element on the billboards is the logo. The rest of the material on the billboards refers to the public issue of safe driving, decidedly noncommercial. But regardless of placement or size, a logo plastered onto a billboard which is otherwise noncommercial could unquestionably be removed. A court would certainly conclude that the commercial and noncommercial elements of SpaceY’s billboards are not inextricably intertwined.

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2. Under the *Bolger* framework, SpaceY’s billboards are commercial speech.

For communication with both commercial and noncommercial elements, it would be “artificial and impractical” to apply different tests piece by piece. *Riley*, 487 U.S. at 796. But deciding which test to apply can be difficult. While the noncommercial speech does not remove the need for regulation, the commercial message does not automatically provide a credible reason for noncommercial censorship. *See Bolger*, 463 U.S. 60, at 81 (Stevens, J., concurring). “Because the degree of protection afforded by the First Amendment depends on whether the activity sought to be regulated constitutes commercial or non-commercial speech, we must first determine the proper classification.” *Id.* at 65. Classification of communication under the *Bolger* framework requires considering (1) if it’s an advertisement of some form, (2) if it refers to a specific product, and (3) whether the speaker has an economic interest in the speech. *See id.* at 66–67.

The Supreme Court, in *Bolger*, held that informational pamphlets on contraceptive use were commercial because they served as advertisements for Youngs’ business, mentioned a specific product Youngs sold, and the purpose of mailing them to potential consumers was economically motivated. *See Bolger*, 463 U.S. 60, at 66–67. The Court emphasized that each factor on its own would be insufficient to deem the pamphlets commercial, but together the characteristics were sufficient. *See id.* at 67. Similarly, in *Jordan*, 743 F.3d 509, at 520 (7th Cir. 2014), the Seventh Circuit applied the *Bolger* test to Jewel Food Stores’ full-page advertisement in Time Magazine’s commemorative Michael Jordan Hall of Fame issue. It concluded that the page was an advertisement, despite its explicit function of congratulating Mr. Jordan on his

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accomplishments, due to its implicit function of promoting Jewel's brand through its logo. *See id.* at 519. The Court determined that while no specific product was mentioned, the ad was clearly economically motivated since Jewel "expected valuable brand enhancement" from the exposure. *Id.* at 520.

Applying the *Bolger* factors to Kent's potential claim, it's clear that SpaceY's billboards are an advertisement since they promote SpaceY by using its logo on large highway billboards. Also, much like the situation in *Jordan*, the billboards fail to reference a specific SpaceY product but certainly serve the economic interests of its speaker through brand promotion. "An advertisement is no less commercial because it promotes brand awareness or loyalty rather than explicitly proposing a transaction in a specific product or service." *Jordan*, 743 F.3d 509, at 518 (7th Cir. 2014). Under the *Bolger* framework, there is a very strong basis to find that SpaceY's billboards are properly classified as commercial speech.

SpaceY may attempt to distinguish this case from *Jordan* by arguing that it was not economic motivation but concern for public safety which prompted the billboards. SpaceY could argue that the economic motivation of brand awareness from the average consumer is not relevant to SpaceY like it was for Jewel, because SpaceY's only customers are NASA and extremely wealthy individuals who can afford to purchase a ticket to travel to space. Furthermore, SpaceY's CEO Eton Lusk's stated reason for erecting the billboards was to spread a safety message around driving and the importance of checking your blind spot. However, in *Jordan*, the Court held that "Jewel's ad cannot be construed as a benevolent act of good corporate citizenship," and neither can the actions of SpaceY. *Jordan*, 743 F.3d 509, at 518 (7th Cir. 2014).

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In spite of SpaceY’s limited market for space travel, brand awareness is still a relevant economic motivation for the billboards. Otherwise, why include the logo on the billboards? Clearly, it was to inform passersby of the source of the message and promote awareness of SpaceY in the process. General consumer awareness and opinion could potentially affect stock prices and commercial value for any company, regardless of the cost of their products or services. *See* Due.com. *How much does brand strength play into stock prices?* Nasdaq (May 14, 2018), <https://www.nasdaq.com/articles/how-much-does-brand-strength-play-into-stock-prices-2018-05-14>. Moreover, simply linking commercial speech to an important public issue does not automatically entitle it to the constitutional protection afforded noncommercial speech. *See* *Fox*, 492 U.S. 469, at 475. A commercial message can comment on a public issue while retaining its nature as commercial speech. *See id.* A court is likely to find that SpaceY did have an economic motivation for the billboards, so it will probably classify SpaceY’s billboards as commercial speech under the *Bolger* framework.

3. SpaceY’s billboards are moderately likely to be classified as commercial speech in order to protect Kent’s rights.

Commercial speech is protected because the public is entitled to receive information, including through advertisements. *See* *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 455 U.S. 728, 764–65 (1976). Also, spending money to deliver a message does not diminish its function. *See id.* at 761. The free flow of information is essential to a democratic society, and freely available commercial information allows consumers to engage in “informed and reliable decisionmaking.” *Consol. Edison Co. of New York v. Pub. Serv. Comm’n*, 47 N.Y.2d 94, 110 (1979). However, commercial speech is generally afforded a lower

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level of constitutional protection in order to protect consumers from harm caused by commercial information that is misleading or related to unlawful activity. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563–64 (1980). Consequently, First Amendment doctrine allows some but not full protection for commercial speech traditionally out of a consideration for public policy concerns.

The Seventh Circuit, in *Jordan*, provided another purpose for the lesser degree of protection afforded commercial speech. It concluded that classifying Jewel’s ad as commercial speech was necessary as “[a] contrary holding would have sweeping and troublesome implications for athletes, actors, celebrities, and other trademark holders seeking to protect the use of their identities or marks.” *Jordan*, 743 F.3d 509, 520 (7th Cir. 2014). Kent, a former professional athlete, like Michael Jordan, is a member of the community the Court seeks to protect.

The relevant type of advertisement is that in which a company uses a famous person’s identity to explicitly promote a noncommercial message alongside implicit yet powerful brand promotion. Classifying such advertising “as constitutionally immune noncommercial speech would permit advertisers to misappropriate the identity of athletes and other celebrities with impunity.” *Jordan*, 743 F.3d 509, at 520 (7th Cir. 2014). Hence, a function of the commercial speech doctrine is to allow famous individuals, whose identities possess commercial value, to protect themselves from identity appropriation without reciprocal compensation.

SpaceY used an image of Kent without his permission on a billboard that placed the company’s logo beside a message telling drivers to check their blind spots. While the explicit message of the billboards is about safe driving, the implicit function is to promote SpaceY. Accordingly, Kent’s identity is used to promote brand awareness for SpaceY. This argument

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hinges on whether a court would find that using the picture of Kent being sacked on SpaceY's billboards qualifies as using his identity. Assuming they hold that it qualifies, a court is moderately likely to conclude that classifying SpaceY's billboards as commercial is necessary to protect Kent from having his identity appropriated without his permission.

CONCLUSION

It is very likely that a court will classify SpaceY's billboards as commercial speech. A court will certainly conclude that the noncommercial speech, a message promoting safe driving, is not inextricably intertwined with the commercial speech, SpaceY's logo. The billboards are an advertisement in form, and while they do not mention a specific product, they undeniably serve SpaceY's economic motivation of brand promotion. In conjunction with the need to classify SpaceY's billboards as commercial to allow Kent to protect his rights, a court is very likely to hold that SpaceY's billboards are properly classified as commercial speech under existing First Amendment doctrine.

Word Count: 2,381